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In the Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES OPPOSING EXCEPTIONS

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QUESTIONS PRESENTED

1. Whether, in this proceeding to enforce the decree in *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), Nebraska and the United States are entitled to summary judgment affirming that the Inland Lakes in Nebraska shall continue to receive water from the North Platte River with the same priority as other components of the North Platte Project.

2. Whether either Nebraska or Wyoming is entitled to summary judgment resolving Wyoming's right to develop water resources on the Laramie River, a tributary of the North Platte River.

3. Whether either Nebraska or Wyoming is entitled to summary judgment resolving Wyoming's right to develop water resources on Deer Creek, another tributary of the North Platte River.

4. Whether Nebraska, Wyoming, or Colorado is entitled to summary judgment resolving Nebraska's rights to water in the North Platte River downstream of the Tri-State Dam in Nebraska.

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STATEMENT

On October 6, 1986, the State of Nebraska petitioned this Court to enforce the North Platte Decree entered in *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), modified, 345 U.S. 981 (1953). The Court granted Nebraska leave to file its petition, 479 U.S. 1051 (1987), and referred the matter to Special Master Owen Olpin, 483 U.S. 1002 (1987), who has filed his First and Second Interim Reports, 492 U.S. 903 (1989); 112 S. Ct. 1930 (1992). The States of Nebraska, Wyoming, and Colorado and amicus curiae Basin Electric Power Cooperative have filed exceptions to the Master's reports. The United States submits this brief in response to those exceptions.

A. The Original Proceedings

In 1934, the State of Nebraska brought an original action in this Court against the State of Wyoming, seeking an equitable apportionment of the North Platte River. See *Nebraska* v. *Wyoming*, 325 U.S. at 591. In the course of the next 11 years, the State of Colorado was impleaded as a defendant, the United States intervened, Special Master Michael Doherty was appointed to take evidence, and (after a lengthy investigation) he issued a report. This Court reviewed the 274-page Doherty Report and largely followed its recommendations. See 325 U.S. at 616-617.

The Court's 1945 decision focused on the immediate problem at hand: the North Platte's flow was overappropriated, and water users in Wyoming and Colorado were depleting the water supply before it reached downstream users in Nebraska. The Court perceived a clear need for an interstate apportionment of available water based on principles compatible with state water law systems. 325 U.S. at 616-617. As the Court explained, under the state law doctrine of prior appropriation, "priority of appropriation gives superiority of right." *Id.* at 617. The Court concluded that this "priority rule" should be the "guiding principle" in ensuring that available water is fairly allocated among the States. The Court also noted, however, that a "just and equitable" apportionment might require departures from that principle. *Id.* at 618.

The Court was well aware that the apportionment controversy was "a delicate one and extremely complex." 325 U.S. at 617. It attempted to provide a workable solution to the practical problem by formulating a decree to "deal with conditions as they obtain today." *Id.* at 620. The Court observed that if conditions "substantially change, the decree can be adjusted to meet the new conditions." *Ibid.* Mindful that the North Platte Basin was experiencing a drought, the Court also concluded that its apportionment should be based on the "dependable flow." *Ibid.* "Crops cannot be grown on expectations of average flows which do not come, nor on recollections of unusual flows which have passed down the stream in prior years." *Ibid.*, quoting *Wyoming* v. *Colorado*, 259 U.S. 419, 476 (1922).

Having stated those principles, the Court applied them to sequential sections of the North Platte River, from its source in Colorado to the Nebraska-Wyoming border. 325 U.S. at 621-655; see App., *infra* (map); 325 U.S. at 593-607 (describing the "natural sections" of the river). For each section, the Court examined Special Master Doherty's detailed inventory of the water supply, existing and proposed uses, their water requirements, their priorities compared to other rights, and the downstream effect of upstream limitations. The Court basically concluded that established priorities should be protected from any material increase in diversions that pose a concrete threat to the water supply. But the Court declined to prohibit alleged harms that were speculative, concluding that appropriate relief would be available if the threat materializes and "promises to disturb the delicate balance of the river." *Id.* at 625. See also *id.* at 622-623, 626-627, 628-629, 632-633, 637, 654, 655, 657.

Broadly viewed, the Court's decision had three prominent features. First, it allowed Colorado and Wyoming water users on the upper reaches of the North Platte River (from its source to Pathfinder Reservoir) to continue existing diversions, while pro-

hibiting certain new diversions that would diminish downstream water supplies. See 325 U.S. at 621-625. Second, the decision established priorities among federal storage reservoirs and certain canals that supply water for irrigation during the growing season. *Id.* at 625-637.[1] Third, the decision provided a proportional allocation of the North Platte River's natural flow from Whalen Dam near the confluence of the North Platte and Laramie Rivers in Wyoming to the Tri-State Dam, just across the border in Nebraska. *Id.* at 637-654.[2]

The Court directed the parties to formulate a decree "to carry this opinion into effect." 325 U.S. at 657. The resulting North Platte Decree contains a series of injunctions that, in accordance with the Court's decision, impose specific prohibitions on water diversions that pose an actual or impending threat to established uses. See Decree ¶¶ I-V (325 U.S. at 665-672).[3] The Decree also contains other definitional

[1] Generally speaking, certain Nebraska canals that predated the Bureau of Reclamation's North Platte and Kendrick Projects have the most senior rights. 325 U.S. at 625-626, 630-631. The North Platte Project's Pathfinder and Guernsey Reservoirs, which store water primarily for Nebraska irrigation districts, have seniority over the subsequently constructed Kendrick Project's Seminoe and Alcova Reservoirs, which store water primarily for a Wyoming irrigation district. *Id.* at 626, 632-633.

[2] The Court apportioned 75% of the irrigation season flow to Nebraska and 25% to Wyoming, based on a rough proportion of the respective States' irrigation requirements and relative priorities in that reach. See 325 U.S. at 640-646.

[3] The Decree generally follows the structure of the Court's opinion, imposing prohibitions beginning at the headwaters of the North Platte River and extending to the Wyoming-Nebraska border. Thus, paragraph I of the Decree enjoins Colorado from diverting or storing water in excess of prescribed amounts from the source of the North Platte River to the Colorado-Wyoming border. 325 U.S. at 665. Paragraph II enjoins Wyoming from diverting or storing water in excess of prescribed amounts from the Colorado-Wyoming border to Guernsey Reservoir. *Id.* at 665-666. Paragraphs III and IV establish priorities among the Nebraska canals, the North Platte Project reservoirs, and the Kendrick project reservoirs, which divert water at various points for the most part in Wyoming. *Id.* at 666-667. Paragraph V apportions the natural flow from the Guernsey Reservoir to the Tri-State Dam, located in Nebraska near the Wyoming border. *Id.* at 667-669.

[4] In 1953, this Court approved a stipulation by the parties to amend the Decree to take into account the Bureau of Reclamation's construction and operation of the Glendo Unit of the Pick-Sloan Missouri Basin Program. See 345 U.S. at 981. The Decree, as modified, appears in Special Master Olpin's Second Interim Report at B1-B11.

and administrative provisions. See Decree ¶¶ VI-XV (325 U.S. at 669-672). Paragraph XIII, the so-called "reopener" provision, is particularly important. In keeping with the Court's decision to postpone resolution of abstract conflicts until they pose a concrete problem, paragraph XIII provides that "[a]ny of the parties may apply at the foot of this decree for its amendment or for further relief." *Id.* at 671-672.[4]

B. The Current Proceedings

In 1986, Nebraska invoked paragraph XIII of the Decree for an order enforcing the decree and for injunctive relief. See First Interim Rep. 2 & n.1; Second Interim Rep. 4. Nebraska contended that Wyoming has violated Nebraska's rights under the Decree through actions or proposed actions that would deprive Nebraska of water. Wyoming admitted the actions alleged in Nebraska's petition but denied that those actions violated the Decree, and it also filed a

counterclaim against Nebraska. This Court referred the matter to Special Master Olpin, together with several requests for intervention by private parties. See Second Interim Rep. 5-7.

The Special Master has supervised pretrial proceedings and discovery aimed at narrowing and defining the isues. His First Interim Report, filed in 1989, explained his reasons for preliminary denial of Wyoming's comprehensive motion for summary judgment. The Special Master basically concluded that "there are outstanding issues of material fact" that precluded summary judgment at that stage of the proceedings. First Interim Rep. 16. He left open, however, "the possibility of summary adjudication on any issue later in the proceedings." *Id.* at 17-18; see *id.* at 18-37.[5] After the parties conducted extensive discovery, the Special Master entertained renewed motions for summary judgment. His Second Interim Report explains his recommendation on four central issues in the case: (1) the Inland Lakes dispute; (2) the Laramie River dispute; (3) the Deer Creek dispute; and (4) the "below-Tri-State" issues. See Second Interim Rep. 16-19; see also *id.* at 109-110 (proposed order).[6]

1. The Inland Lakes are Bureau of Reclamation reservoirs located in Nebraska. They are part of the Bureau's North Platte Project and serve Nebraska irrigators. During the non-irrigation season, the

[5] The Special Master also denied the pending motions for intervention, but gavē the private parties liberal opportunity to participate as amici curiae. See First Interim Rep. 6-14.

[6] The Special Master also recommended against granting the private parties' renewed motions for intervention. Second Interim Rep. 101-108. Those parties have not filed exceptions to that recommendation.

Bureau diverts North Platte water at the Whalen Dam, located in Wyoming, to the Inland Lakes by way of the Interstate Canal. In addition, the Bureau frequently stores water temporarily in the Glendo and Guernsey Reservoirs, upstream of the Whalen Dam, pending its transfer through the Interstate Canal. Nebraska's petition alleged that Wyoming was interfering with the Bureau's water deliveries to the Inland Lakes. See Neb. Pet. ¶ 3(d). Wyoming responded that it was entitled to curtail deliveries because the Inland Lakes do not have a Wyoming storage permit. The Special Master recommended that the Court grant the motions of Nebraska and the United States for summary judgment on this issue, concluding that the Inland Lakes are entitled to continue receiving water deliveries with the same priority date as other components of the North Platte Project. See Second Interim Rep. 16, 19-35.

2. The Laramie River is a North Platte tributary that originates in Colorado and flows into the Whalen-to-Tri-State section of the North Platte River. Wyoming granted a permit for construction of the Grayrocks Reservoir on the Laramie River and is considering whether to grant a permit for construction of the Corn Creek Project, which would result in additional diversion facilities at the confluence of the Laramie and North Platte Rivers. Nebraska's petition alleged that those storage and diversion facilities would deplete the Laramie River contributions to the North Platte, and thereby diminish flows that Nebraska is entitled to receive under the Court's apportionment. See Neb. Pet. ¶ 3(a) and (b). Wyoming responded that it is entitled to consume all of the relevant Laramie flows under a prior decree of this Court. See *Wyoming* v. *Colorado*, 259 U.S. 419 (1922),

amended, 260 U.S. 1 (1922), vacated and new decree entered, 353 U.S. 953 (1957) (Laramie Decree). The Special Master recommended that the Court deny the motions of both Nebraska and Wyoming for summary judgment. He concluded that the North Platte Decree takes into account Laramie contributions, but that the Grayrocks Reservoir does not currently pose a "tangible threat" to Nebraska's asserted rights and a trial may be necessary to determine the effect of the Corn Creek Project. Second Interim Rep. 17-18, 35-71.

3. Deer Creek is a North Platte tributary that originates in central Wyoming and flows into the Pathfinder-to-Guernsey section of the North Platte River. Wyoming's proposed Deer Creek Project would result in the construction of a reservoir on Deer Creek that would store and divert water for various uses. Nebraska's petition alleged that the project would deplete the Deer Creek contributions to the North Platte and would diminish flows that Nebraska was entitled to receive under the Court's apportionment. See Neb. Pet. ¶ 3(d). Wyoming responded that the Deer Creek development would not diminish Nebraska's entitlement and that, in any event, the North Platte Decree's "municipal use" provision would allow the development. See Decree ¶ X (Second Interim Rep. B7). The Special Master recommended that the Court deny the motion of Wyoming for summary judgment, concluding that "material factual issues remain as to how Deer Creek actually will be operated" and "whether and to what extent it is an exempt municipal use." Second Interim Rep. 18, 71-89.

4. The Tri-State Dam, located about one mile east of the Wyoming-Nebraska border, marks the end of the Whalen-to-Tri-State section of the North Platte River.

As we have explained, this Court has apportioned the natural flow in that section during the irrigation season, granting 75% to Nebraska and 25% to Wyoming. The Court did not impose an apportionment of the North Platt eRiver downstream of the Tri-State Dam, because it appeared that other sources, including return flows from North Platte irrigation diversions, would provide sufficient water to meet the needs in the downstream section. See 325 U.S. at 654-655. Nebraska contended in the proceedings below that it has a legal entitlement to use of those return flows, because the Decree was premised on their availability. Colorado and Wyoming responded that the Decree protects only Nebraska's right to divert specific amounts of water upstream of the Tri-State Dam. The Special Master recommended that the Court deny for the most part the motions of Nebraska, Wyoming, and Colorado for summary judgment. He concluded that summary judgment would be premature on the current evidentiary record. The Master recommended, however, that the Court grant partial summary judgment to Nebraska to clarify that Nebraska is entitled to 75% of the natural flow in the Whalen-to-Tri-State section without regard to the beneficial use requirements of the individual canals. Second Interim Rep. 18-19, 89-100.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Nebraska initiated this action to enforce its rights and to obtain injunctive relief under the North Platte Decree, which apportions the flow of the North Platte River between Wyoming and Nebraska. The Special Master had prepared thorough reports discussing the parties' motions for summary judgment on four central issues in this case. Nebraska, Wyoming, Colorado, and amicus curiae Basin Electric Power Cooperative have filed exceptions to the Special Master's determinations. Wyoming raises the principal objections. It contends that the Special Master's analysis "rests on a fundamental misconception of the Decree and the nature of this lawsuit" (Wyo. Br. 26; see *id.* at 26-37), and it objects to each of the Special Master's specific recommendations on the motions for summary judgment (*id.* at 31-74). The United States is in substantial agreement with the Special Master's recommendations. We respond first to Wyoming's contention that the Special Master misconceived the nature of the lawsuit and the underlying Decree. We then examine the Special Master's determinations in light of the specific exceptions lodged by Wyoming and the other parties.

I. Wyoming's assertion that the Special Master misunderstood the nature of these proceedings is entirely unfounded. The Special Master expressly recognized that his primary responsibility "is to interpret the 1945 Decree from the original proceedings and then apply that interpretation to resolve the various issues presented by the motions." Second Interim Rep. 13. As his thorough reports demonstrate, he has followed exactly that course. Wyoming's assertion that the Special Master has misread the Decree

as the source of, rather than as a limitation on, Wyoming's authority to divert water, rests on Wyoming's own misreading of the Special Master's analysis. Wyoming's argument that the Special Master has systematically neglected principles of finality and repose simply reflects Wyoming's disagreement with the Master as to what specifically was decided in the original proceedings.

II. The Special Master has recommended a proper disposition of the pending motions for summary judgment. As he explains, the Court should enter summary judgment affirming that the Inland Lakes are entitled to continued diversions of 46,000 acre-feet of North Platte water during the non-irrigation season. Those diversions were a "vital underpinning" of the Court's apportionment, and Wyoming waived its right to object to the adequacy of the Bureau of Reclamation's state water permits by failing to raise that challenge in the original proceedings. The motions for summary judgment on the Laramie issues should be denied, because those motions are based on incorrect interpretations of the North Platte and Laramie Decrees. The motions for summary judgment on the Deer Creek issues should be denied because material facts are in dispute, while the motions for summary judgment on the below-Tri-State issues are for the most part premature. The Court should clarify, however, that Nebraska's apportionment is not limited by the estimated water requirements of specific canals.

ARGUMENT

I. THE SPECIAL MASTER CORRECTLY UNDERSTOOD THE NATURE OF THESE PROCEEDINGS AND THE NORTH PLATTE DECREE

Wyoming contends that the Special Master "misconceived" his role in three respects. According to Wyoming, the Special Master failed to recognize that: (a) this is an action to interpret and enforce the North Platte Decree; (b) the Decree is not the source, but only a limitation, on Wyoming's authority to use water within its borders; and (c) the Decree finally resolved matters that were litigated in the original proceedings. See Wyo. Br. 26-31; see also Basin Elec. Amicus Br. 6-11. Those assertions are baseless.

Wyoming's first contention, that the Special Master misunderstood the nature of these proceedings (Wyo. Br. 26-28), finds no support in the Special Master's reports. Indeed, the Special Master accurately explained the nature of the proceedings at the outset of the Second Interim Report. He first described the physical characteristics of the North Platte Basin (Second Interim Rep. 1-3), this Court's entry of the 1945 Decree (*id.* at 3-4), and the proceedings that have culminated in the current motions for summary judgment (*id.* at 4-10). The Special Master then correctly articulated the standards for granting a motion for summary judgment (*id.* at 10-13) and explained the substantive basis for his decision (*id.* at 13-16). The Special Master expressly recognized:

> In ruling on the pending summary judgment motions, my primary task is to interpret the 1945 Decree from the original proceedings and then apply that interpretation to resolve the various issues presented by the motions.

Id. at 13. Thus, the Special Master clearly understood that the core purpose of these proceedings is to interpret and apply the Decree to the specific issues identified by the parties.

Wyoming's underlying objection seems to be that the Special Master should not be allowed to suggest modifications of the North Platte Decree, because Nebraska initiated this lawsuit only "to enforce" Nebraska's apportionment. See Wyo. Br. 26-28.[7] That argument, however, overlooks the character and purpose of the Decree. The Court apportioned the North Platte River through its decision in *Nebraska* v. *Wyoming*, *supra*. The Decree was formulated by the parties "to carry this opinion into effect." 325 U.S. at 657. As the Special Master recognized, if the plain language of the Decree does not resolve the issues before him, he may look beyond that implementing document to the Court's underlying decision and determine whether the Court has resolved the issues presented. Second Interim Rep. 14. See *Wyoming* v. *Colorado*, 286 U.S. 494, 508 (1932) ("Certainly the limited injunction which was granted does not warrant any inference that it marks the limits of what was intended to be decided.").

If the Master determines that the Court's prior decision resolves an issue that the Decree does not specifically address, he may recommend modifications to the Decree that clarify the Court's decision or apply that decision to the matters in dispute in this case. See, *e.g.*, Second Interim Rep. 110 (recommending an addition to the North Platte Decree clarifying the

[7] Nebraska's petition sought an order "enjoining the State of Wyoming from increasing its depletion of the natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree." Neb. Pet. 3-4.

status of the Inland Lakes). If neither the Decree nor the Court's underlying decision resolves some of the matters in dispute, or if an appropriate resolution would require relief beyond what Nebraska requested in its petition, the Special Master may conclude that this case requires action beyond the scope of the Court's reference. In that situation, he may so state, and the parties may seek to expand the Court's reference to the Special Master. But the Special Master should be allowed to make that determination in the first instance, after he has narrowed and identified for this Court the precise issues in dispute. See generally *United States* v. *Louisiana*, 485 U.S. 88, 91-93 (1988).

Wyoming's second contention, that the Special Master misconceived the North Platte Decree as the source of Wyoming's general right to divert and use water rather than as a limitation on the State's sovereign powers (Wyo. Br. 28-29), also finds no support in the Special Master's reports. The Special Master accurately recounted the formulation and contents of the Decree, which he described as "constrain-[ing]" the parties. See Second Interim Rep. 3-4, 14-15. The only example that Wyoming offers of the Special Master's supposed "misconception" is a single sentence, which Wyoming takes out of context and which in any event provides scant support for Wyoming's contention. See Wyo. Br. 28.[8]

[8] Wyoming cites the Special Master's conclusion that "the Decree does not grant the right to Wyoming * * * to dewater the Laramie." Second Interim Rep. 39. Contrary to Wyoming's suggestion, that statement does not reflect any misconception that the North Platte Decree was the original source of Wyoming's rights. The Special Master was simply responding to *Wyoming's* claim that "by virtue of the statement in the 1945 North Platte Decree * * * she may with impunity dewater the Laramie River." *Id.* at 36. See discussion, pp. 23-36, *infra*.

Wyoming's third contention, that the Special Master failed to accord finality to previously litigated matters (Wyo. Br. 29-31), is also unfounded. As we explain below with reference to his specific recommendations, the Special Master recognized and applied principles of finality and repose. Wyoming simply disagrees with the Special Master's specific determinations as to what was actually decided in the previous litigation with respect to the "Laramie" and "below-Tri-State" disputes. See Wyo. Br. 30-31. As is true of Wyoming's other contentions of systemic error, the Special Master did not have any "fundamental misconception of the Decree and the nature of this lawsuit." Wyo. Br. 26. Instead, he prepared thoughtful and comprehensive recommendations on the matters pending before him.

II. THE SPECIAL MASTER HAS RECOMMENDED A PROPER RESOLUTION OF THE PENDING MOTIONS FOR SUMMARY JUDGMENT

The Special Master has recommended that the motions filed by Nebraska and the United States for summary judgment on the Inland Lakes dispute should be granted and that Nebraska's motion for summary judgment on the below-Tri-State issues should be granted in part, but that all other motions for summary judgment should be denied. The United States largely agrees with the Special Master's recommendations. The exceptions filed by Wyoming, Colorado, and Basin Electric Cooperative are without merit. Although Nebraska raises a significant issue with respect to the Special Master's interpretation of

the Decree's "municipal use" provision, that matter can be revisited in future proceedings.

A. The Inland Lakes Dispute

Nebraska and the United States moved for summary judgment affirming that the Bureau of Reclamation is entitled to continue its historic practice of delivering water from the North Platte River at Whalen Dam, through the Interstate Canal, to the Inland Lakes in Nebraska during the non-irrigation season, in order to meet the water requirements of the North Platte Project.[9] The Special Master correctly concluded that those motions should be granted, because the undisputed facts show that the Bureau's practice is an "essential element" of the North Platte Project and a "vital underpinning" of the Court's apportionment, and because Wyoming failed to raise its objection at the time of that apportionment. Second Interim Rep. 32-35.

As the Special Master explained, from the time the North Platte Project commenced operations in 1913, the Bureau has delivered North Platte water to the Inland Lakes for storage during the non-irrigation season. Second Interim Rep. 19-20. That practice increases both hydropower production and downstream water availability, while reducing North Platte diversions to Nebraska during the irrigation season. Wyoming accepted that practice for many years. It precipitated the current dispute in 1986 by bringing suit against the United States to enjoin the Bureau from continuing those interstate transfers unless it first

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[9] During the irrigation season, water diverted through the Interstate Canal is used to supply the Pathfinder Irrigation District in Nebraska. See Second Interim Rep. 23.

obtained a Wyoming state permit expressly allowing the diversion. See Second Interim Rep. 20-21.[10]

The Special Master observed that the Bureau had obtained Wyoming state water permits at the turn of the century for the North Platte Project, but "[a]pparently no Wyoming permit was issued that specifically mentioned the Bureau's contemplated non-irrigation season diversions through the Interstate Canal for storage in the Inland Lakes." Second Interim Rep. 20; see also *id.* at 24-25. The Special Master also observed, however, that the Bureau's Inland Lakes were a recognized component of the North Platte Project when this Court apportioned the North Platte, *id.* at 25-26, see 325 U.S. at 595, 633, and that "[t]he use and requirements of the Inland Lakes were litigated by Colorado, Wyoming, Nebraska and the United States during the original proceedings," Second Interim Rep. 26. Indeed, the Court's apportionment, based on Special Master Doherty's report, was explicitly premised on the expectation that Nebraska's water requirements during the irrigation season could be reduced by storing 46,000 acre-feet of North Platte water in the Inland Lakes during the non-irrigation season. *Id.* at 26-28; see 325 U.S. at 646. That practice has continued to the present day. Second Interim Rep. 28-29.

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[10] At the time Wyoming brought that suit, it was preparing environmental documentation for the proposed Deer Creek Project. Second Interim Rep. 29 n.44, 33 n.51. That documentation indicated that the yields from the Deer Creek Project could be improved if the Project's priority could be established as senior to the Inland Lakes. The United States removed Wyoming's suit to federal court, where it was dismissed without prejudice in light of Nebraska's original action in this Court. See *Wyoming ex rel. Christopulos* v. *United States*, No. C86-0370-B (D. Wyo. Aug. 31, 1990).

Relying on that undisputed record, the Special Master correctly concluded that the North Platte Decree should be amended to state explicitly that the Bureau's Inland Lakes diversion shares the same 1904 priority date as other North Platte Project operations (including the Interstate Canal, see Second Interim Rep. 24; 325 U.S. at 649) and that the Bureau is entitled to continue diverting 46,000 acre-feet of North Platte water to the Inland Lakes during the non-irrigation season. Second Interim Rep. 32-35, 109-111. The Special Master considered Wyoming's objections, *id.* at 30-32, and properly rejected them, *id.* at 32-35.

Wyoming first contends that the Special Master erred, because, in its view, "it is undisputed that the Inland Lakes have no water storage right under state law" (Wyo. Br. 51)—by which Wyoming means that the Bureau does not have a permit specifically referring to storage in the Inland Lakes (see *id.* at 51-54). As the Special Master noted, that argument "beg[s] the critical question," because "[t]he issue is not whether Wyoming issued to the Inland Lakes separate, identifiable permits." Second Interim Rep. 32. "The key material fact is that since 1913 the Inland Lakes have been used for storage of natural flows during the non-irrigation season." *Id.* at 32.

The Inland Lakes "were an integral component of the North Platte Project from the outset"—a fact that Wyoming has never disputed, see Second Interim Rep. 25—and they "have been treated throughout the century as having a December 6, 1904 priority." *Ibid.* "It is clear that [Special Master Doherty] recommended and the Court recognized in the Decree a right to store in the Inland Lakes 46,000 acre feet of natural flow during the non-irrigation season," and this was "a vital underpinning of the ultimate

apportionment." *Id.* at 33. Furthermore, the "North Platte Project components continue to depend upon the right of the Inland Lakes to store water and thus upon a priority commensurate with the other components." *Ibid.*

Given that history, the Special Master was entirely justified in concluding that if the Bureau was required to obtain a separate state permit for the Inland Lakes, "the time for Wyoming to have challenged the alleged lack of individual permits for the Inland Lakes was certainly no later than during the original proceedings." Second Interim Rep. 34. The Bureau's use of the Inland Lakes is a central feature of the historic administration of the North Platte River, and to change that feature now "would violate [this] Court's admonition in *Nebraska* v. *Wyoming* that to the extent possible, 'established uses should be protected.'" *Id.* at 34-35. Simply put, Wyoming's current complaint about the adequacy of the Bureau's state permits comes nearly half a century too late. Cf. *Arizona* v. *California*, 460 U.S. 605, 619-626 (1983); *Wyoming* v. *Colorado*, 286 U.S. at 507.

Wyoming nevertheless argues that the Special Master erred in recognizing a 1904 priority for the Inland Lakes, because the Decree does not expressly state that the Inland Lakes are entitled to such a priority. Wyo. Br. 54-56. The Decree, however, provides injunctive relief only as to matters that were in dispute. The Decree does not contain a specific priority date for the Inland Lakes because no one challenged that diversion. Second Interim Rep. 26. To the contrary, as the Special Master explains (and Wyoming ultimately acknowledges, Wyo. Br. 56), both Wyoming and Colorado advocated increasing the Bureau's non-irrigation season diversions to the Inland Lakes as a predicate for reducing Nebraska's

apportionment of water available during the irrigation season—an apportionment for lands that concededly had a 1904 priority date. Second Interim Rep. 26-28. See 325 U.S. at 595, 646, 649 n.2; Doherty Rep. 60-61.

As this Court explained in interpreting the Laramie Decree, the Court provides injunctive relief only to the extent that the parties request and demonstrate a need for such relief. *Wyoming* v. *Colorado*, 286 U.S. at 508. Accordingly, the mere fact that the Court's Decree itself is silent in some respects "does not warrant any inference that it marks the limits of what was intended to be decided." *Ibid.* "Such an inference would be inconsistent with other parts of the decree and with the opinion and the findings therein." *Ibid.* In this case, there was no need for the Decree specifically to address the validity and priority of the Inland Lakes diversion, because no one disputed that it would continue, and indeed Nebraska's apportionment rested on the premise that it would. Now that Wyoming does dispute the Bureau's practice—nearly 80 years after it began and nearly 50 years after the entry of the Decree—the Special Master has appropriately concluded that what is clear from the Court's opinion should be made explicit in the Decree. See Second Interim Rep. 109.

Wyoming also argues that the Special Master erred in recommending summary judgment on the Inland Lakes issue, because he cited "equitable concerns" that, according to Wyoming, raise questions of disputed material fact. Wyo. Br. 56-62. Wyoming, however, misreads the Special Master's analysis. The Special Master did not consider "whether in equity the Decree should be modified to create an Inland Lakes storage right." Wyo. Br. 57. He simply recognized that principles of finality rest in part on "equi-

table concerns" and that Wyoming's encouragement of the Inland Lakes diversion in the original proceedings implicated those concerns. Second Interim Rep. 33-34. If the Inland Lakes require a separate state permit now, they required a separate state permit then. Wyoming should therefore have raised its permit objection in the original proceedings, rather than relying on the Inland Lakes diversions to reduce Nebraska's irrigation season apportionment. *Id.* at 34-35. The Special Master correctly concluded that Wyoming's election of the latter course was dispositive and rendered Wyoming's various issues of fact immaterial. *Id.* at 32, 36.

Finally, Wyoming challenges the Special Master's determination that protection for the historic operations of the Inland Lakes should include the Bureau of Reclamation's longstanding practice of temporarily storing Inland Lakes water in Glendo and Guernsey Reservoirs. Wyo. Br. 62-63. Wyoming contends that the Special Master's recommendation is improper because the practice "has no basis in the original proceeding" and the United States has not sought congressional or state approval for the practice. *Ibid.* Those contentions are without merit.

The Special Master recognized that the Court's 1945 apportionment is premised, in part, on the actual delivery of 46,000 acre-feet of water to the Inland Lakes during the non-irrigation season. The Bureau of Reclamation employs the Guernsey and Glendo Reservoirs to accomplish that delivery. As former Bureau Project Manager David Wilde explained, the Bureau uses those reservoirs for temporary winter storage of water destined for the Inland Lakes, until weather conditions allow delivery of the water through the Interstate Canal. Second Interim Rep. 24, 31; First Wilde Aff. ¶ 35. The Spe-

cial Master properly concluded that the Bureau's practice is essential to the apportionment, even though those particular uses of Guernsey (and later Glendo) Reservoir were not discussed in the earlier proceedings. See Second Interim Rep. 35.[11]

Wyoming suggests, without support, that the temporary storage of water in the two federal reservoirs requires either congressional or state authorization. Wyo. Br. 63. As Mr. Wilde's affidavit explains, the Bureau of Reclamation's routine operations include the temporary storage of water belonging to one reservoir in another, which maximizes the generation of hydroelectric power. First Wilde Aff. ¶ 31. Guernsey Reservoir was used for temporary storage before Glendo was completed and both reservoirs have been used for that purpose since 1960. *Id.* ¶¶ 25-28. Wyoming has failed to show that the Bureau's Glendo and Guernsey operations are unlawful or otherwise inappropriate. See 43 U.S.C. 373 (granting the Secretary broad authority to operate projects to carry out statutory purposes).[12]

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[11] Wyoming's reference (Wyo. Br. 63 n.29) to this Court's refusal to authorize joint operation of federal projects in the earlier proceedings is inapposite. See 325 U.S. at 632-633. The question in those proceedings was whether the United States could operate the projects without regard to priorities in order to achieve greater efficiencies. The temporary storage of Inland Lakes water does not disregard the Inland Lakes priority, but rather implements and protects it, while respecting other rights as well.

[12] The Glendo Reservoir's reclamation and power operations are governed by the reclamation laws pursuant to Section 9(c) of the Flood Control Act of 1944, ch. 665, 58 Stat. 891. Significantly, the Glendo planning documents explained that Glendo Reservoir would be operated to maximize generation of power and that releases of temporarily stored water belonging to other ownerships would be a principal source of hydropower. Bureau of Reclamation Definite Plan Report for the Glendo Unit, at 3, 15, 21-22 (Dec. 1952) (attached to Third Wilde Aff.). Wyoming acceded to that understanding when it agreed to obtain legislation for the operation of Glendo Reservoir in "substantial conformity" with the Bureau of Reclamation Definite Plan and when it joined in the 1953 request for amendment of the Decree. 345 U.S. at 983. See note 4, *supra*. Furthermore, as Wyoming acknowledges, its officials have consented to the temporary storage of Inland Lakes water in Glendo and Guernsey Reservoirs as part of the annual operating agreements. Wyo. Br. 63.

B. The Laramie River Dispute

Wyoming and Nebraska filed competing motions for summary judgment resolving Wyoming's right to develop water resources on the Laramie tributary of the North Platte River. Wyoming contended that this Court's Laramie and North Platte Decrees allowed it to divert all water in the Laramie and denied Nebraska any right to Laramie contributions to the North Platte River, while Nebraska contended that its North Platte apportionment includes a share of the Laramie flows that have historically reached the North Platte River. See Second Interim Rep. 36-37. The Special Master correctly rejected both arguments in their extreme form and denied both motions for summary judgment. At the same time, he properly concluded that Nebraska had equities to be considered based on contributions that the Laramie had made and continues to make to the Whalen-to-Tri-State section of the North Platte River. *Id.* at 63-64, see generally *id.* at 41-63. The Master additionally concluded that any objections by Nebraska to the Grayrocks Project and the proposed Corn Creek Project based on such equitable (yet unquantified) interests would not necessarily require resolution at this time. *Id.* at 38-41.

1. Wyoming and Amicus Basin Electric except to the Special Master's denial of Wyoming's motion for summary judgment. See Wyo. Br. 65-69; Basin Elec. Amicus Br. 20-26. They contend that summary judgment is compelled by the plain language of paragraph XII(d) of the North Platte Decree, which states that the Decree "shall not affect":

> The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River.

Second Interim Rep. B8. See Wyo. Br. 64-67; Basin Elec. Amicus Br. 24. They also rely on the Court's statement in *Nebraska* v. *Wyoming* that the Laramie River apportionment is "in no way affected by the decree in this case." 325 U.S. at 592 n.1. See Wyo. Br. 65; Basin Br. 23.

The Special Master correctly rejected those arguments. He recognized that the Court's *Nebraska* v. *Wyoming* decision and paragraph XII(d) of the North Platte Decree's clearly provide that the North Platte apportionment would leave undisturbed the Laramie River apportionment. Second Interim Rep. 49. But he also recognized that this limitation would not affect rights in any unapportioned part of the Laramie River's flow. *Ibid.* The Special Master reviewed the record of the Laramie Decree and concluded that this Court had apportioned the flow of the Laramie River only down to and including the Wheatland Project. *Id.* at 41-42 & n.60. See *Wyoming* v. *Colorado*, 259 U.S. at 488 ("the diversion for the Wheatland District (the lowest diversion we are to consider)"). Thus, paragraph XII(d) has no application to the Laramie accretions below Wheatland, which make a substantial contribution to the

North Platte's flow in the critical Whalen-to-Tri-State region. See Second Interim Rep. 52, 59-60.[13]

Wyoming and Basin Electric contend that the Special Master's interpretation of the Laramie Decree is incorrect, suggesting that the Laramie Decree gives Wyoming control over the entire flow of the Laramie River not specifically apportioned to Colorado under that Decree. They rely, however, on a provision of the 1957 Laramie Decree, entered by joint motion of Wyoming and Colorado, that grants Wyoming "the right to divert and use all water flowing and remaining in the Laramie River and its tributaries after such diversion and use in Colorado." *Wyoming* v. *Colorado*, 353 U.S. at 953. See Wyo. Br. 66-67; Basin Elec. Amicus Br. 21-22. The 1957 Laramie Decree is inapposite here. Paragraph XII(d) of the North Platte Decree preserves only the "apportionment heretofore made" between Wyoming and Colorado—in other words, the Court's apportionment in the 1922 Laramie Decree—and the 1922 apportionment did not deter-

[13] As the Special Master explained, his conclusion is consistent with the treatment the Laramie flows received in the original proceedings. See Second Interim Rep. 49-58. This Court and Special Master Doherty included Laramie contributions in determining the North Platte water supply available for apportionment in this case. *Id.* at 48, 54. Wyoming had advocated the addition of Laramie River inflows to the total supply available for apportionment between Nebraska and Wyoming, and Special Master Doherty had included Laramie inflows in his discussion of tributary contributions to the Whalen-to-Tri-State reach, in his summary of each party's water supply exhibits, in his determination of the long-term supply, and in his calculation of supply for apportionment. *Ibid.* See Doherty Rep. 22, 63. In short, "an assumption was made: the Laramie was one of the sources of water for the North Platte, and it would continue to be so." Second Interim Rep. 60.

mine rights below the Wheatland District. See 259 U.S. at 458. Thus, if we assume *arguendo* that the 1957 Laramie Decree did determine Wyoming's rights vis-à-vis Colorado to the below-Wheatland flows, that determination still would not be part of the "apportionment heretofore made," and it would not in any event absolutely bar Nebraska from asserting its claims, since it was not a party to that (or the 1922) Decree. Cf. *City of Vicksburg* v. *Henson*, 231 U.S. 259, 269 (1913) ("It is well settled * * * that a decree is to be construed with reference to the issues it was meant to decide.").[14]

2. Nebraska objects, for a different reason, to the Special Master's treatment of the Laramie flows. Nebraska argues that the North Platte Decree apportioned part of those flows to Nebraska. Neb. Br. 18-32. Nebraska reasons that the Laramie inflows were "an express and integral part of" Special Master Doherty's "apportionment fund" (*id.* at 15-16), and the Court's specific inclusion of Spring Creek, another

[14] Wyoming and Basin Electric also rely on a statement in this Court's 1936 opinion enforcing the 1922 Decree. See *Wyoming* v. *Colorado*, 298 U.S. 573 (1936). See Wyo. Br. 66-67; Basin Elec. Amicus Br. 23 n.22. The Court therein described the 1922 Decree as establishing "the right of the State of Wyoming and her water claimants to receive and divert within that State the remaining waters of the stream and its tributaries in virtue of appropriations prior in time and right to the tunnel appropriations in Colorado." 298 U.S. at 578. That summary description of the 1922 Decree did not extend the Court's 1922 apportionment to the section below Wheatland. In any event, the Court's description of the 1922 Decree referred only to Wyoming's rights with respect to appropriations that were "prior in time and right" to Colorado's appropriations. Wyoming and Basin Electric omit that portion of the quotation. See Wyo. Br. 66; Basin Elec. Amicus Br. 23 n.22.

tributary entering the Whalen-to-Tri-State reach of the North Platte, confirmed this Court's intent to unalterably fix the rights to this stretch of the River (*id.* at 16). The Special Master correctly rejected Nebraska's position. Second Interim Rep. 39. Based on his review of the record, he concluded that neither this Court nor Special Master Doherty ever made any precise disposition of the Laramie inflows. *Id.* at 59.

The Special Master's conclusion is consistent with this Court's basic approach in the original proceedings, wherein it refused to resolve speculative disputes. As we have explained, the Court defined rights and imposed restraints only where there was a concrete threat to an over-appropriated water supply. See p. 3, *supra*. Where there was no concrete threat, the Court deferred decision, recognizing that an actual factual situation would sharpen the inquiry and allow "the delicate adjustment of interests which must be made." 325 U.S. at 618. See, *e.g.*, *id.* at 622-623, 624-625, 628-629, 632-633, 637. Cf. 325 U.S. at 658 (Roberts, J., dissenting) ("No State may play dog in the manger and build up reserves for future use in the absence of present need and present damage."). At the time of the original proceedings in this case, Wyoming and Nebraska apparently believed that Laramie inflows would be available for apportionment without immediate threat to depletion. The Court accordingly had no reason to impose any restraint on their use.

3. In addition to addressing the general question of restraints on Laramie River flows, Special Master Olpin also addressed Wyoming's motion for summary disposition of Nebraska's ultimate challenges to Wyoming's Grayrocks Project and its Proposed Corn Creek Project. The Grayrocks Project, a Basin Elec-

tric power plant, periodically releases water to the river pursuant to the 1978 settlement of earlier litigation. Second Interim Rep. 65. The issue presented here is whether Wyoming may allow those releases to be appropriated, thereby depriving Nebraska of the benefit of its settlement. The Corn Creek Project is a proposed irrigation development at the confluence of the Laramie and the North Platte, which could cause further depletions of the water supply. *Id.* at 69.

a. The Special Master concluded that the Grayrocks Project currently poses no concrete threat to Nebraska. Second Interim Rep. 65-69. Nevertheless, the Special Master concluded:

> In view of Wyoming's refusal to assure that she will support the 1978 Settlement Agreement, her insistence that the depletion of Grayrocks releases by new appropriators could be permitted under Wyoming law despite the terms of the 1978 Settlement Agreement, and her lack of participation in the Grayrocks proceedings—an equitable consideration—I recommend that paragraph XIII of the Decree be amended to make relief available at the foot of the Decree.

Id. at 68-69 (footnotes omitted), 110 (proposed amendment). In short, the Special Master correctly concluded that resolution of this issue should be deferred, preserving the opportunity of the United States and Nebraska to return to Court for relief in the event that a more concrete threat of depletion develops. That approach is consistent with the Master's determination that the Laramie inflows constitute an important contribution to the North Platte River flows that are available for apportionment during periods of dependable flow. It is also consistent

with this Court's recognition that protection of established uses and senior priorities was a primary objective of the equitable apportionment. 325 U.S. at 617-618.

Wyoming's principal objection to the Master's Grayrocks decision is based on a misreading of it. Wyoming mistakenly interprets the proposed amendment to the Decree as "subject[ing] Wyoming to a suit in the original jurisdiction in aid of enforcement of that Settlement Agreement." Wyo. Br. 71. Although the proposed amendment does refer to the settlement agreement, it does not specifically call for enforcement; rather it contemplates potential relief based on the "effect" of depletion of the Grayrocks releases. Thus, the proposed provision is similar to other provisions of the North Platte Decree's "reopener" provision. See Second Interim Rep. B8-B9.[15]

b. The Master also correctly decided to defer resolution of the Corn Creek issues pending further pretrial proceedings. Second Interim Rep. 70-71. His decision was appropriately based on representations by counsel for Wyoming that the Corn Creek Project was sufficiently concrete to present a threat to the apportionment. *Id.* at 70. Wyoming objects to that decision, arguing that Nebraska and Basin Electric

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[15] Wyoming and Basin Electric also argue that the Grayrocks claim should be dismissed because Nebraska's petition asserted that Wyoming was "[d]epleting the flows of the North Platte River by the operation of Greyrocks Reservoir," Neb. Pet. ¶ 3(a), and not that Wyoming was allowing depletion of Grayrocks releases. Wyo. Br. 71 n.31; Basin Elec. Amicus Br. 17. Nebraska, however, has clarified in the proceedings before the Special Master that it is concerned that Wyoming would allow diversion of the Grayrocks releases before they reach the apportioned section of the river. See also Neb. Pet. Reply Br. 11.

resolved the Corn Creek Project's effects in the 1978 Grayrocks settlement agreement. See Wyo. Br. 73-74; Basin Elec. Amicus Br. 17-20. The Master concluded, however, that factual uncertainties had arisen in connection with the Project's effects and its relationship to the Grayrocks settlement. Second Interim Rep. 71. He therefore properly concluded that summary disposition at this juncture would be inappropriate. If his further inquiry reveals no relevant issue of material fact in dispute, the Special Master may resolve the Corn Creek issue without trial. *Ibid.* At this juncture, however, it would be premature for the Court to decide the appropriateness of doing so.

C. The Deer Creek Dispute

1. Wyoming moved for summary judgment dismissing Nebraska's objections to Wyoming's proposed Deer Creek Project. That project would result in construction of a storage reservoir on the Deer Creek tributary, which enters the North Platte River between Pathfinder and Guernsey Reservoirs. Wyoming contended that Nebraska had failed to make an adequate showing of threatened injury and that, in any event, the Deer Project is exempted from challenge under the North Platte Decree's paragraph X, which provides:

> This Decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

Second Interim Rep. B7; see *id.* at 73-74. The Special Master has properly recommended that this Court deny Wyoming's motion. *Id.* at 74.

As the Special Master noted, Nebraska has challenged the Deer Creek Project under paragraph XIII(c) of the Decree, wherein the Court retained jurisdiction to consider the "question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir." Second Interim Rep. B9. See *id.* at 71-72 & n.97. The Special Master correctly concluded that the "question of the effect" of the Deer Creek Project could not be resolved summarily because of outstanding issues of material fact. *Id.* at 77, 88.

The Special Master determined that the evidence proffered by Nebraska, which indicated that the Deer Creek Project would have substantial effects on federal projects and other established uses, was legally sufficient to counter Wyoming's contention that the Project would have no significant impact. Second Interim Rep. 75-77. He also concluded that a "municipal exemption" could not be summarily accorded to the Deer Creek Project without factual resolution of material disputes concerning the project's municipal character and operation. *Id.* at 83-87. He indicated, however, that, if the Deer Creek Project is shown as a matter of fact to qualify as an "ordinary and usual" municipal use within the meaning of paragraph X of the decree, it ought not be subject to paragraph XIII(c)'s "effect" analysis. *Id.* at 74 n.99, 77.

Wyoming excepts to portions of the Special Master's Deer Creek recommendation, arguing that: (1) summary judgment is appropriate as a matter of law because the issue of development on tributaries like Deer Creek was raised in the earlier litigation, but resulted in no limitation in the decree; (2) Nebraska has not presented sufficient evidence that the Deer

Creek Project would actually deprive Nebraska canals of necessary water; and (3) issues of municipal administration identified for trial would inappropriately involve this Court in intrastate water administration. Wyo. Br. 38-50.

Wyoming's first argument, that the Deer Creek claim should be summarily resolved based on the absence of a specific prohibition in the Decree (Wyo. Br. 38-39), is without merit. Although the Court did consider tributary development in the original proceedings, it expressly deferred consideration of "[t]he question of the effect" until a concrete threat appeared. Decree ¶ XIII(c) (Second Interim Rep. B9). See 325 U.S. at 624-625 ("We find no evidence of any present threat to the water supply from this source. If such threat appears and it promises to disturb the delicate balance of the river, application may be made at the foot of the decree for an appropriate restriction."). Thus, there is no basis for Wyoming's contention that this Court's prior decision finally determined the matter.

Wyoming's second argument, that Nebraska has failed to provide sufficient evidence to defeat summary judgment (Wyo. Br. 38-43), is also without merit. That argument rests largely on Wyoming's theory, rejected by the Special Master in a later portion of his report (Second Interim Rep. 98-99), that the only legally cognizable evidence of injury sufficient to defeat summary judgment would be injury to the Nebraska canals diverting from the Whalen-to-Tri-State reach of the river, not below the Tri-State Dam. See pp. 36-40, *infra*.[16] Moreover, the

[16] Wyoming admitted that operation of the Deer Creek Project would deplete natural flows in the mainstem of the North Platte River. Second Interim Rep. 75.

Special Master found that evidence submitted by Nebraska describing the threat that the Deer Creek Project posed to the water supply of the federal reservoirs and the Inland Lakes was sufficient to establish a genuine issue of material fact requiring resolution. First Interim Rep. 30-31; Second Interim Rep. 75-77 (quoting Becker Aff. ¶¶ 2, 3). That evidence, standing alone, is sufficient to support the Special Master's denial of summary judgment.

Wyoming's third argument, that the Deer Creek Project's municipal character bars Nebraska's challenge (Wyo. Br. 43-50), is similarly without merit. The Special Master correctly concluded that material issues of fact preclude a summary determination of the Deer Creek Project's qualification as an "ordinary and usual" municipal use within the meaning of paragraph X of the Decree. The municipal character of the project is in question, because it was not designed solely as a municipal project, and only a portion of its 60,000-acre-feet capacity would be devoted to municipal uses, none of which would be immediately needed. See First Interim Rep. 28; Second Interim Rep. 71, 83-85.[17]

Material factual issues also exist as to how the Deer Creek Project would be operated vis-à-vis other established uses on the North Platte River, Second Interim Rep. 86, which is a matter of significant concern with respect to the water supply for the Inland Lakes and the federal projects. Affidavits submitted by the United States explain that Deer

[17] Although Deer Creek enters the North Platte downstream of Casper, Wyoming contends that the Project would be operated to furnish Casper and other communities with municipal water through a water exchange. Second Interim Rep. 78.

Creek is an important source of the Inland Lakes' North Platte water supply, especially during years of low flow or drought, when the federal projects have needed all of the Deer Creek inflows to satisfy project ownerships and meet irrigation requirements. Wilde Aff. ¶¶ 64-72.[18]

Although Wyoming objects (Wyo. Br. 48-49) to the Special Master's decision to take evidence on how the Deer Creek Project will be administered in relation to other more senior rights on the North Platte River, that evidence is necessary to evaluate the project's municipal character. Second Interim Rep. 85-87. Moreover, if Wyoming should operate the Deer Creek Project out of priority, it would present a threat to senior water rights on the North Platte River similar to that posed by the Kendrick Project, which was a precipitating factor for the apportionment in the earlier proceedings. See 325 U.S. at 599, 624-627. Thus, contrary to Wyoming's assertions, questions about the administration of the project go directly to "the question of the effect" of the construction of Deer Creek Reservoir, bringing them squarely within paragraph XIII of the Decree.[19]

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[18] In its application for a Clean Water Act permit, Wyoming provided two sets of analyses of the Deer Creek project impacts—one operating the project senior to the Inland Lakes and one operating the project junior to the Inland Lakes. In response to interrogatory requests posed by the United States, Wyoming has refused to commit to operate the project junior to the federal projects. Wyoming's Response to United States Interrogatory 2 (Docket Entry No. 79). Thus, the "spectre that Wyoming might operate Deer Creek Reservoir * * * in some manner that is inconsistent with the Decree" (Wyo. Br. 48-49) is not idle speculation.

[19] See also, *e.g.*, 325 U.S. at 622 ("Nor can we see how existing projects can be protected on the basis of the 1931-1940 supply if additional projects in Colorado are permitted.").

2. Nebraska excepts to the Special Master's conclusion (Second Interim Rep. 74, 77, 78, 85-86) that if the Decree's paragraph X exemption for municipal uses applies to the Deer Creek Project, it would entirely override paragraph XIII(c)'s provision for evaluation of "effects" of actual or threatened construction. Neb. Br. 32-54. Nebraska argues that the Special Master's reading of paragraph X is at odds with its plain language (*id.* at 35-37), conflicts with the record in the original proceedings (*id.* at 37-41), and creates numerous problems for resolution of the Deer Creek issues (*id.* at 47-54). Although the United States has not excepted to the Special Master's denial of summary judgment motions on the Deer Creek issues, we agree with Nebraska that his interpretation of paragraph X is problematic.

It seems doubtful that this Court intended paragraph X of the Decree, which governs "use or diversion of water" for "ordinary and usual" municipal uses, to carve out a complete exemption for large tributary storage projects, like the proposed Deer Creek Project, from paragraph XIII(c)'s provision for further review. A more plausible reading of paragraph X is that it was intended to exempt the small municipal diversions then in existence from the injunctive provisions of the decree. See Doherty Rep. 180. That interpretation is supported by the casual way in which the provision was adopted, see Neb. Br. 38-41, in contrast to the fierce competition among the States to protect relatively small quantities of water in other contexts. See, *e.g.*, Second Interim

Rep. 79; 325 U.S. at 620-623 (discussion of additional irrigation in Colorado); *id.* at 648 (addition of 2855 acre-feet contribution of Spring Creek to apportionment fund).[20]

As a practical matter, a definitive reconciliation of paragraphs X and XIII(c) should await the resolution of the pertinent factual issues identified by the Special Master. See Second Interim Rep. 88-89. On the one hand, Wyoming has in the past indicated that it might not operate the project in priority with all of the more senior rights on the river. That action could place the project outside of paragraph X's "ordinary and usual" municipal use category. See *id.* at 72 n.98, 86-87. On the other hand, operation of the Deer Creek Project in priority with those uses may eliminate any detrimental "effect" under paragraph XIII(c) to the extent that all senior users on the North Platte River are protected. For this reason, we have found it unnecessary to challenge the Special Master's interpretation of paragraph X at this time.

D. The Below-Tri-State-Dam Issues

Wyoming and Colorado moved for summary judgment limiting Nebraska's evidentiary presentation to claims of injury above the Tri-State Dam, arguing that "evidence of instream uses and uses supplied by diversions below Tri-State Dam is immaterial to proof of violation of Nebraska's apportionment under the Decree." Second Interim Rep. 93. The Special Master recommended that this Court deny those motions, concluding that summary disposition of that issue would be "premature" at this juncture of the litigation. *Id.* at 92. The Special Master concluded that "there is nonetheless one subsidiary question that can be answered now: I recommend that the Court rule that the Decree does not impose absolute ceilings for Nebraska's diversions in the Whalen to Tri-State section on a canal-by-canal basis." *Ibid.* Wyoming, Colorado, and Basin Electric take exception to the Special Master's recommendations. Wyo. Br. 31-37; Colo. Br. 3-13; Basin Elec. Amicus Br. 27-28.

[20] Wyoming's compilation of water rights in the earlier proceedings revealed only small municipal uses at the time. There were no municipal storage projects similar to the proposed Deer Creek Project diverting water from the North Platte River. See Wyo. Exhs. 4-6, 47.

The Special Master correctly concluded that it would be improvident at this stage of the proceedings to issue a legal ruling "advising Nebraska on how she may develop her case and the propositions for which her evidence will be deemed material." Second Interim Rep. 94. The Master explained:

> To rule on such questions now would be to issue an advisory opinion that Wyoming and Colorado cannot unlawfully injure Nebraska's downstream of Tri-State interests except by actions that will violate the Decree with respect to her upstream of Tri-State apportionment.

Ibid. In concluding that "there is no wisdom in ruling on that question in the abstract," *ibid.*, the Master was influenced by the interrelationship of the various sections of the river. As he explained, if the upstream development Nebraska challenges alters the water supply below Tri-State, the Court's factual predicate for providing no apportionment below Tri-State—that below-Tri-State uses were adequately met by local supplies and return flows—could be eliminated. *Id.* at 94-95. Thus, the Special Master was entirely justified in deciding "to proceed cau-

tiously until Nebraska has developed her factual case." *Id.* at 94.

The Special Master's approach is consistent with this Court's preference for a fully developed factual record upon which to resolve such disputes among the States. See 325 U.S. at 617-618, 627, 645. In this instance, the North Platte River stood in "delicate balance" at the time of the 1945 apportionment, and the Court recognized that new development could potentially upset that balance. *Id.* at 625. The Special Master correctly declined to preclude below-Tri-State evidence at the threshold, before he has seen what that evidence is and how it may relate to the apportionment. To do otherwise could deny this Court an adequately developed factual record at later stages of the litigation.

Wyoming suggests that further development of the record would be unnecessary if this Court were to sustain Wyoming's contention that "the requirements of Nebraska's canals in the Whalen to Tri-State Dam section are the measure and limit of Nebraska's existing apportionment." Wyo. Br. 34-35. As the Special Master explained, that contention is incorrect and "should be resolved now." Second Interim Rep. 95. "The uncontradicted facts do not establish Wyoming's claim; instead, they lead to the opposite conclusion, requiring a ruling in favor of Nebraska on this question." *Ibid.*

The apportionment of the Whalen-to-Tri-State reach of the North Platte River, which grants Nebraska 75% and Wyoming 25% of the natural flow in that reach, was fashioned in rough proportion to the respective needs of the Nebraska and Wyoming canals diverting out of that section of the river. 325 U.S. at 641, 646. This Court, however, specifically

declined to adopt Nebraska's canal requirements as a measurement of, or limit to, Nebraska's entitlement to water. *Id.* at 628, 655. Instead, the Court adhered to Special Master Doherty's approach, which used the canal requirements to arrive at an appropriate proportional division of the natural flow between the States. See Second Interim Rep. 95.

As Special Master Olpin explained, Special Master Doherty addressed this matter with "particular care." Second Interim Rep. 95. Master Doherty concluded that it was appropriate to use Nebraska canal requirements to ascertain the relative equities between the States, but he doubted his power "to fix such limitations upon individual canals." Doherty Rep. 160-161, quoted in Second Interim Rep. 96-97. Master Doherty concluded:

> Consequently, the findings herein as to requirements cannot, I think, be deemed a limitation upon individual canals or groups, in actual administration, either as to natural flow or storage water, nor do I think any such limitations can properly be imposed by the decree.

Ibid. This Court followed Special Master Doherty's approach when it adopted his proportional division of the natural flow, 325 U.S. at 627, 637-654, and when it denied both the United States' request for a quantification of Nebraska's apportionment, *id.* at 628, and Wyoming's similar request for a mass allocation of Nebraska's entitlement, *id.* at 642, 655. See Second Interim Rep. 90-91, 97-98. Wyoming gives no reason why the earlier rejection of a fixed limit on Nebraska's entitlement should be abandoned now.[21]

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[21] Wyoming contends that the quantification she seeks is supported by paragraph IV of the Decree (Second Interim

As Special Master Olpin explained, Special Master Doherty's report, the Court's opinion and the North Platte Decree are clear: "The beneficial use requirements for the canals determined by Special Master Doherty in the original proceedings do not constitute decreed ceilings for diversions for each of those canals." Second Interim Rep. 99. Nebraska is therefore entitled to a ruling that the "1945 equitable apportionment did not restrict diversions or irrigated acreages of Nebraska appropriators on a canal-by-canal basis." *Id.* at 100.

Rep. B2-B3), which allows certain Nebraska canals to satisfy requirements identified in the Decree by obtaining water in priority over federal reservoirs. See Wyo. Br. 35-37. Special Master Olpin evaluated that argument and correctly concluded that paragraph IV limits the extent to which the Nebraska canals may stop federal reservoirs from storing water, but does not place any "absolute ceilings" or other restrictions on the quantities of water those canals may actually divert. Second Interim Rep. 98-99. Wyoming also asks for a legal ruling to "clarify that the federal reservoirs are not required to bypass natural flow to a senior Nebraska canal under Paragraph IV when that canal is exceeding the diversion limits or seasonal limits fixed in Paragraph IV." Wyo. Br. 36. Such a ruling, however, would be advisory in the absence of a showing that those canals have made calls on the federal reservoirs in violation of paragraph IV. Wyoming has not made such a showing.

CONCLUSION

The exceptions to the First and Second Interim Reports of the Special Master should be denied.

Respectfully submitted.

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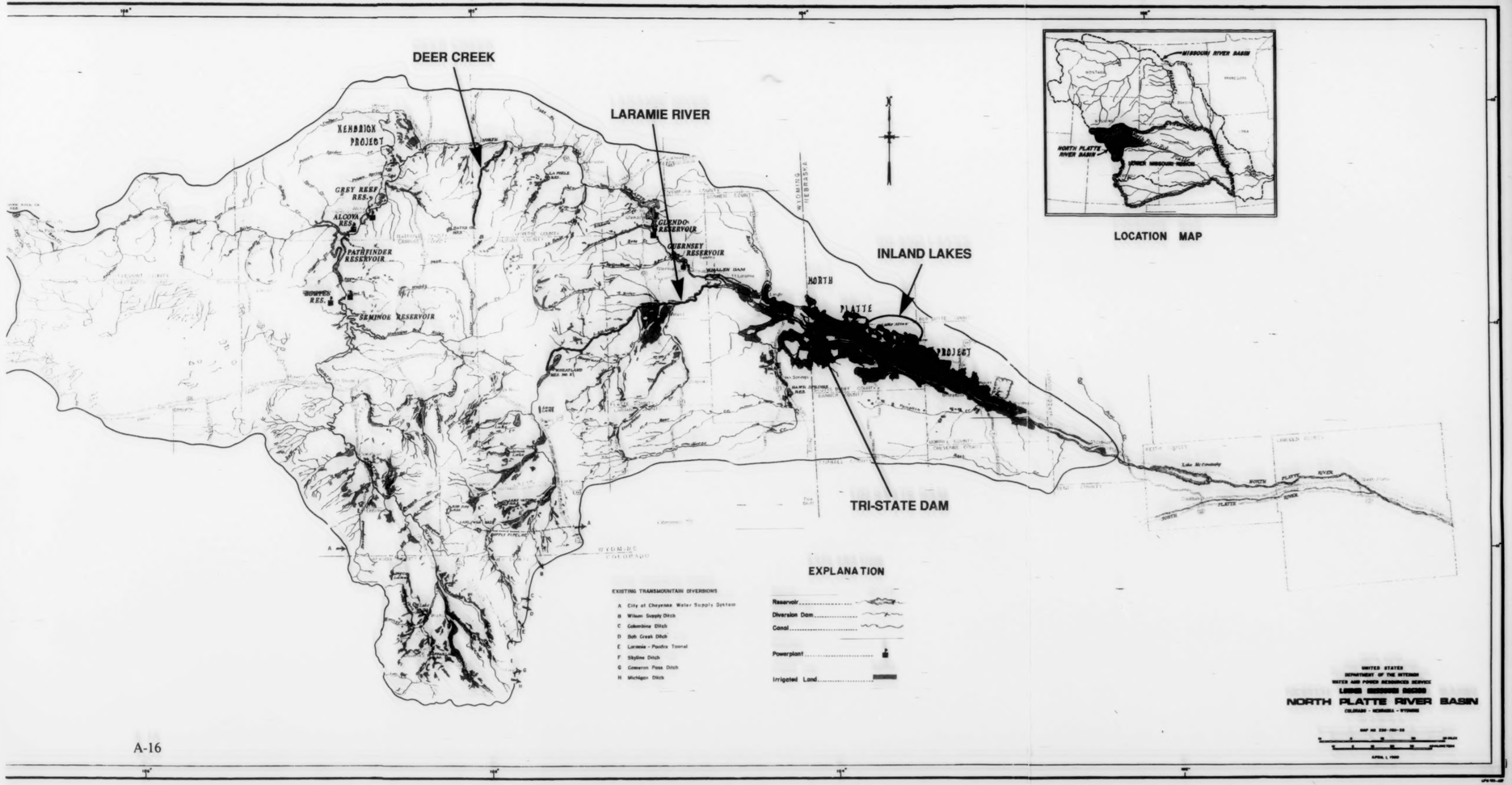
DEER CREEK
LARAMIE RIVER
INLAND LAKES
TRI-STATE DAM
KENDRICK PROJECT
GREY REEF RES.
ALCOVA RES.
PATHFINDER RESERVOIR
SEMINOE RESERVOIR
GLENDO RESERVOIR
GUERNSEY RESERVOIR
WHALEN DAM
NORTH PLATTE PROJECT
LOCATION MAP
MISSOURI RIVER BASIN
NORTH PLATTE RIVER BASIN
EXPLANATION
EXISTING TRANSMOUNTAIN DIVERSIONS
A City of Cheyenne Water Supply System
B Wilson Supply Ditch
C Colombine Ditch
D Bob Creek Ditch
E Laramie - Poudre Tunnel
F Skyline Ditch
G Cameron Pass Ditch
H Michigan Ditch
Reservoir
Diversion Dam
Canal
Powerplant
Irrigated Land
UNITED STATES
DEPARTMENT OF THE INTERIOR
WATER AND POWER RESOURCES SERVICE
NORTH PLATTE RIVER BASIN
COLORADO - NEBRASKA - WYOMING